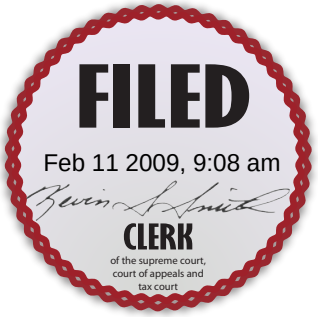

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IN THE COURT OF APPEALS OF INDIANA

STRATA GRAPHICS, INC.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 69A04-0806-CV-341
	)	
CIRRUS PRODUCTS, INC.,	)	
	)	
and	)	
	)	
FOUNDERS ACQUISITION CORP. d/b/a GIVNISH FAMILY FUNERAL HOMES,	)	
	)	
and	)	
	)	
FOUNDERS SERVICE CORPORATION d/b/a GIVNISH FAMILY FUNERAL HOMES,	)	
	)	
Appellees-Defendants,	)	
	)	
and	)	
	)	
BATESVILLE CASKET COMPANY, INC.,	)	

)
Appellee/Non Party.)

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl H. Taul, Judge
Cause No. 69C01-0704-MI-7

February 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Strata Graphics, Inc. ("Strata") appeals the trial court's granting of a discovery protective order in favor of and award of sanctions to Batesville Casket Company, Inc. ("Batesville"). We affirm in part and reverse in part.

Issues

The dispositive issues before us are:

I. whether the trial court properly issued a protective order quashing Strata's subpoenas to depose two Batesville employees; and

II. whether the trial court properly required Strata to pay Batesville $6969.05 in fees and costs for obtaining the protective order.

Facts

In 2004, Strata, a Pennsylvania company, entered into a contract with Givnish Family Funeral Homes ("Givnish"),[1] based in Philadelphia, to provide several funeral-related products to Givnish: portraits, prayer cards, tri-fold cards, and DVDs. These products were to be used in conjunction with a "Life Celebration Memorial Program" that Givnish marketed as a package of funeral products and services. App. p. 12. In January 2005, representatives of Strata and Givnish traveled to Batesville to try to enlist Batesville in participating in the "Life Celebration Memorial Program." Ultimately, Batesville declined to participate.

However, at the conclusion of the January 2005 meeting, Batesville Vice President Michael DiBease approached Strata's president, Jeff Sammak, to discuss another business opportunity. Specifically, DiBease wanted to explore the possibility of Strata manufacturing "cap panels" that could be used with Batesville caskets. A cap panel is a decorative emblem that can be placed in an open casket lid during viewing of the deceased, such as a depiction of the official Navy seal for a Navy veteran. Batesville sells approximately 70,000 cap panels per year. After talking to Sammak and writing him a letter about their discussion, DiBease assigned full responsibility for assessing the feasibility of a cap panel project with Strata to Jon Doyle, Batesville's Director of New Product Development. The final decision whether to pursue the project was Doyle's to make.

[1] Givnish does business under the Givnish name, but also owns or controls several entities that are parties in this litigation: Cirrus Products, Inc., Founders Acquisition Corporation, and Founders Service Corporation.

Heather Owens, a Batesville project manager who reported to Doyle, was the contact person with Strata for the project. She prepared reports that Doyle reviewed regarding the cap panel project's feasibility. In mid-2005, Owens was scheduled to rotate to a different job assignment and was set to be replaced by Jeremy Raver. In anticipation of filling Owens's position and taking over any dealings with Strata, Raver traveled once to Strata's factory, observed its production process, and met employees, including Sammak.

Strata alleges that in June 2005, counsel for Givnish phoned John Zerkle, Batesville's in-house general counsel, and told Zerkle that Givnish had an exclusive distribution agreement with Strata and that a cap panel project with Batesville would violate that agreement. Cap panels, however, were not among the products Strata agreed to provide to Givnish under the "Life Celebration Memorial Program" agreement. Shortly thereafter, Batesville informed Strata that it would not pursue the cap panel project.

Based on Batesville's refusal to pursue the cap panel project with Strata, on July 11, 2005, Strata sued Givnish in Pennsylvania for tortious interference with prospective contractual relations, commercial disparagement, and trade libel. As part of its discovery, Strata subpoenaed a number of Batesville employees and executives for deposition, including DiBease, Doyle, Zerkle, Owens, and Raver. After Doyle, Zerkle, and Owens were deposed, Batesville filed a motion in Ripley County, Indiana, to quash the subpoenas for DiBease and Raver and for a protective order. Batesville specifically

claimed that any testimony DiBease and Raver could provide would be cumulative, unnecessary, and/or irrelevant. Batesville also sought its fees and costs associated with the motion to quash, "[g]iven Strata Graphics' persistence and frivolousness in pushing these depositions forward . . . ." App. p. 44.

On April 28, 2008, the trial court held a hearing on the motion to quash and for a protective order. Batesville directed the court's attention to the depositions of Doyle, Zerkle, and Owens, and their collective testimony that neither DiBease nor Raver had any input into the final decision not to proceed with the cap panel project with Strata. Rather, according to Doyle, he decided not to pursue the project for business reasons after reviewing a final report about it that Owens had prepared. Doyle also testified that he had not spoken with any attorney for Batesville about the project before deciding not to pursue it. There was no specific discussion at this hearing as to whether Batesville was entitled to fees and costs for seeking a protective order. The trial court took the motion under advisement.

On May 8, 2008, the trial court granted Batesville's request for a protective order and quashed the subpoenas for DiBease's and Raver's depositions. It also concluded, "Further, given Strata Graphics' persistence in forcing the Motion, Batesville Casket is awarded its fees and cost [sic] for having to bring the Motion." Id. at 8. On June 6, 2008, Batesville filed a petition and accompanying affidavit from its attorney asserting that it had incurred attorney fees and costs of $6,969.05 in seeking the protective order.

On June 16, 2008, without a hearing or response from Strata, the trial court granted the full amount of Batesville's requested fees and costs. Strata now appeals.

Analysis

I. Granting of Protective Order

We begin by addressing whether the trial court properly granted the protective order in the first place, prohibiting the depositions of DiBease and Raver. A trial court has broad discretion in ruling upon discovery matters and we will interfere with such rulings only where the trial court has abused its discretion. Estate of Lee ex rel. McGarrah v. Lee & Urbahns Co., 876 N.E.2d 361, 367 (Ind. Ct. App. 2007). An abuse of discretion occurs if the decision is against the logic and natural inferences to be drawn from the facts of the case. Id. We will affirm the ruling if it is sustainable on any legal basis in the record. Id.

"The rules of discovery are designed to allow a liberal discovery process, the purposes of which are to provide parties with information essential to litigation of the issues, to eliminate surprise, and to promote settlement." Hatfield v. Edward J. DeBartolo Corp., 676 N.E.2d 395, 399 (Ind. Ct. App. 1997), trans. denied. The sum of the discovery rules is that, generally, discovery should go forward, but, if challenged, a balance must be struck between the need for the information and the burden of supplying it. In re WTHR-TV, 693 N.E.2d 1, 6 (Ind. 1998). To that end, Indiana Trial Rule 26(C) provides:

> Protective orders. Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is being taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (1) that the discovery not be had . . . .

Under this rule, the burden is initially on the party seeking the protective order to show "good cause" why such an order is required to protect it from "annoyance, embarrassment, oppression, or undue burden or expense[.]" Estate of Lee, 876 N.E.2d at 367-68. Additionally, Trial Rule 26(B)(1) provides that a trial court may limit discovery that is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive . . . ." Non-parties to a dispute, such as Batesville in this case, are involuntarily dragged into court and their interest in being left alone is a legitimate consideration in the balancing between the need for information and the burden of supplying it. See WTHR-TV, 693 N.E.2d at 6.

Here, Strata is alleging that Givnish scuttled a potential business relationship between Strata and Batesville by improperly invoking the contract between Strata and Givnish in at least one discussion with Zerkle, Batesville's general counsel. Strata did depose Zerkle, who indicated that any discussions he had with counsel for Givnish had no effect on Batesville's decision not to pursue the cap panel project with Strata. Doyle and Owens also were deposed, for a total of ten hours. Doyle described at length that he

made the final decision not to pursue the Strata project based on Owens's reports evaluating it, and that the decision was based purely on business considerations and not as the result of any conversation with attorneys.

In support of its motion to quash and for protective order, Batesville also submitted sworn declarations from DiBease and Raver. DiBease asserted that after he brought up the possibility of pursuing the cap panel project with Strata, he assigned full responsibility for the project to Doyle, and that Doyle's decision not to pursue the project was Doyle's alone to make and that he did not question that decision. As for Raver, he asserted, which was corroborated by Doyle's deposition, that although he made one trip to Strata's facility, he had no decision-making authority as to whether to pursue the cap panel project and made no recommendations to Doyle whether to pursue it.

On the basis of this information, we cannot say the trial court abused its discretion in quashing the subpoenas to depose DiBease and Raver and issuing the protective order. The information gleaned from the depositions of Zerkle, Doyle, and Owens establishes the process by which Batesville decided not to pursue a business relationship with Strata. Those depositions, along with DiBease's and Raver's sworn declarations, also indicate that those two persons were not involved in that decision. Obviously, Batesville's decision not to pursue the cap panel project is the crux of Strata's lawsuit against Givnish. The trial court, acting within its discretion, reasonably could have concluded that forcing DiBease and Raver to sit through depositions would be unreasonably cumulative and burdensome, particularly for a non-party to the lawsuit between Strata

and Givnish. We affirm the quashing of the subpoenas and issuance of the protective order.

II. Attorney Fees and Costs

We now separately address whether the trial court properly awarded Batesville the $6969.06 in attorney fees and costs it claims it incurred in filing and obtaining the protective order. Indiana Trial Rule 26(C)(8) states that Trial Rule 37(A)(4) applies to the award of expenses incurred in relation to a protective order. Rule 37(A)(4) in turn states in part:

> Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

When a trial court enters a protective order, there is a presumption that the court also will order reimbursement of the prevailing party's reasonable expenses. Ledden v. Kuzma, 858 N.E.2d 186, 189 (Ind. Ct. App. 2006). "This award of fees is mandatory, subject only to a showing that the losing party's conduct was substantially justified or that other circumstances make an award of expenses unjust." Id.

At the outset, we note that Strata's first argument on this issue is that it was denied an opportunity for a hearing on the propriety of awarding fees and costs to Batesville, as is expressly required by Rule 37(A)(4). See Drake v. Newman, 557 N.E.2d 1348, 1352

(Ind. Ct. App. 1990), trans. denied. Batesville's position essentially is that the April 28, 2008 hearing on the issuance of a protective order in the first place was sufficient opportunity for Strata to contest any award of fees and costs to Batesville.

Regardless of whether the trial court was required to conduct a separate hearing on the fees issue, we conclude the record before us is sufficient for us to say that Strata's conduct in seeking to depose DiBease and Raver was "substantially justified" and, therefore, the award of fees and costs to Batesville was improper. A person is "substantially justified" in seeking to compel discovery if reasonable persons could conclude that a genuine issue existed as to whether a person was bound to comply with or entitled to resist the requested discovery. Ledden, 858 N.E.2d at 189. This court has looked to decisions of federal courts interpreting Federal Rule of Civil Procedure 37(A)(4) for guidance in defining the phrase "substantially justified." See Penn Cent. Corp. v. Buchanan, 712 N.E.2d 508, 513 (Ind. Ct. App. 1999), trans. denied. In that regard, the United States Supreme Court has stated that "substantially justified" "has never been described as meaning 'justified to a high degree,' but rather has been said to be satisfied if there is a 'genuine dispute,' or 'if reasonable people could differ as to [the appropriateness of the contested action] . . . .'" Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 2550 (1988) (citations omitted). In other words, "substantially justified" means "'justified in substance or in the main'--that is, justified to a degree that could satisfy a reasonable person." Id.

In attempting to depose DiBease and Raver, Strata was not embarking upon a completely random "fishing expedition" of Batesville employees and executives. Instead, both DiBease and Raver had clear connections to the Strata cap panel project. It was DiBease's idea in the first place to look into such a project. Raver was the last Batesville employee to visit Strata's production facility. He was slated to take over Owens's position as Batesville's contact person with Strata.

We note that Trial Rule 26(B)(1), regarding the scope of discovery, provides in part, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter involved in the pending action . . . ." (Emphasis added). There is no claim by Batesville that DiBease and Raver possessed privileged information, or that Strata was seeking information that clearly was precluded from disclosure by law. Cf. Munsell v. Hambright, 776 N.E.2d 1272, 1278 (Ind. Ct. App. 2002) (reversing denial of award of attorney fees under Rule 37(A)(4) where party was attempting to subpoena records clearly precluded from disclosure by statute), trans. denied. Instead, DiBease and Raver arguably had knowledge of Strata and the cap panel project that would be relevant to and possibly shed light upon Batesville's decision not to pursue the project, even if they themselves did not have final decision-making authority on that point. In other words, we believe reasonable persons could disagree as to the necessity of deposing DiBease and Raver. As such, Strata was "substantially justified" in seeking the

depositions and should not be charged with fees and costs for seeking them.[2] Our reversal on this issue necessarily leads us to reject Batesville's request for appellate attorney fees, which also was based upon Trial Rule 37(A)(4).

Conclusion

The trial court did not abuse its discretion in entering a protective order quashing Strata's subpoenas to depose DiBease and Raver. We conclude, however, that Strata was "substantially justified" in seeking those depositions and, therefore, reverse the award of attorney fees and costs to Batesville.

Affirmed in part and reversed in part.

MATHIAS, J., and BRADFORD, J., concur.

[2] It also does not appear Strata was behaving obtusely in attempting to schedule DiBease's and Raver's depositions at a mutually convenient time and location. Although counsel for Batesville ultimately did not want any depositions to be held at the Batesville facility or in the town of Batesville itself, there is no indication that counsel for Strata's offer that the depositions take place there was done with any nefarious purpose, as opposed to trying to be accommodating.